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IN THE

Supreme Court of the United States

October Term, 1964

PEOPLE OF THE STATE OF CALIFORNIA and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners* v. LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, and EL PASO NATURAL GAS COMPANY, *Respondents*	No. 46
SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation, *Petitioners* v. LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, and EL PASO NATURAL GAS COMPANY, *Respondents*	No. 47
FEDERAL POWER COMMISSION, *Petitioner* v. LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, and EL PASO NATURAL GAS COMPANY, *Respondents*	No. 57

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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October 19, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF OF INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

This brief, *amicus curiae*, is filed with the consent of the parties.

INTEREST OF AMICUS CURIAE

Independent Natural Gas Association of America is a trade association whose membership includes most of the major pipeline companies engaged in the transportation and sale of natural gas in interstate commerce subject to the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act. For many years this Association has participated in numerous proceedings before the Commission involving issues affecting the general interests of the natural gas industry and has also participated before this Court and the various courts of appeals in cases arising out of Commission orders.

If the sweeping jurisdictional theory advanced by the Petitioners is adopted by this Court, the Commission's jurisdiction under the Natural Gas Act would burgeon to cover every sale of natural gas which eventually finds its way into an interstate pipeline system, without regard to the purposes for which such sale is made, the contractual arrangements underlying it, or the intended ultimate use of the natural gas involved. Under this theory, any natural gas capable of physical movement into a resale market in another state is designated a sale for resale, notwithstanding the purpose and intent of the parties.

In addition, the Commission would have transportation jurisdiction over pipeline facilities leading to the point of such sales. Transportation arrangements, under which the transporting pipeline neither purchases nor sells the gas transported, would be construed as sales in interstate commerce for resale by the pipeline. Acceptance of Petitioners' theory by this Court would appropriate to the Commission a broad new area of regulatory authority, an area not envisioned by Congress in providing for divided

federal-state regulatory authority. This case, therefore, is of substantial interest to the pipeline-company members of this Association.

QUESTION PRESENTED

Do the provisions of the Natural Gas Act applicable to sales in interstate commerce for resale and to transportation in interstate commerce apply to separately identifiable direct sales for consumption by the purchaser or for sale in intrastate commerce by the purchaser, and to the attendant transportation to the point of sale, all exempt from jurisdiction under the Act, where such gas becomes commingled in transit after sale with gas subject to resale jurisdiction?

STATEMENT

The facts of this case are not in dispute. Two distinct sales are in issue; one for consumption in the state in which the gas is produced, the other for consumption by the purchaser beyond the state in which the gas is produced. The question is one of law and involves the jurisdictional consequences of commingling natural gas, otherwise not subject to jurisdiction under the Natural Gas Act,[1] either because it

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[1] 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w. Section 1(b) of the Natural Gas Act, set forth in the Appendix, contains the basic jurisdictional provisions in issue. It provides for jurisdiction over "transportation of natural gas in interstate commerce", "sale in interstate commerce of natural gas for resale", but states that such jurisdiction does not apply "to any other transportation or sale." Thus all direct sales of natural gas, sales for resale in intrastate commerce, and transportation in intrastate commerce are exempt from jurisdiction under the Act. The question of resale jurisdiction is present with respect to the proposals of both Lo-Vaca Gathering Company and Houston Pipe Line Company. The question of transportation jurisdiction is present only with respect to the proposal of Houston, since it is agreed that a separate proposed sale by Lo-Vaca, not in issue here, would involve transportation in interstate commerce.

is a *direct* sale for the buyers' consumption or for resale in *intra*state commerce, with other natural gas subject to such jurisdiction because sold in *inter*state commerce for resale. Since the Commission's order, reversed by the court below, was declaratory in nature, the question must be viewed abstractly, no record having been made as to the "public convenience and necessity"[2] of the interdependent certificate proposals.

The purchaser, El Paso, proposes to construct, through a subsidiary, El Paso Gas Supply Company, a pipeline to transport the gas purchases involved in this case to its existing facilities (R. 485). This proposed line of 227 miles of large-diameter pipe would connect into El Paso's existing system which proceeds in a westerly direction to the California border, where the bulk of its sales are made. Lo-Vaca and Houston would gather and transport gas which they buy from producers in the gulf coast area of Texas, and sell this gas to El Paso at separate delivery points on the Supply Company's line.

Three separate and distinct contracts were entered into between El Paso and the local gathering-transporting companies. *Two* are involved in this case. One is between Houston and El Paso for 70,000 Mcf a day to be delivered near Three Rivers, Texas (R. 416-459). Under this contract the Houston gas, commingled after delivery with Lo-Vaca gas and later commingled with gas from other sources in Texas, would be consumed wholly in Texas in El Paso's compressor stations and at a gasoline plant owned by

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[2] Section 7(c) of the Natural Gas Act [15 U.S.C. 717f(c)] set forth in the Appendix. This is the basic provision of the Act regulating expansion either in terms of transportation or sales or both.

Phillips Petroleum Company. El Paso at all times would make certain, that such consumption in Texas would be in excess of gas purchased from Houston, and would maintain the metering and delivery facilities necessary to effectuate this purpose.

The contract between Houston and El Paso, specifying the consumption of Houston's gas in Texas, is consistent with Houston's existing operations which are entirely intrastate (R.104). Most of the contracts under which Houston purchases the gas that it transports and sells include a provision permitting the seller to withdraw its gas if such gas is to be resold in interstate commerce (R. 109-111).

Lo-Vaca entered into two separate and distinct contracts with El Paso, the first for 50,000 Mcf a day, the second also for 50,000 Mcf a day which was later increased to 70,000 Mcf a day (R. 820-876). The two contracts were negotiated separately and are supplied by separate gas reserves. The first contract involves a *direct* sale[3] to El Paso for use in its compressors and other facilities outside the State of Texas. The second contract is not restricted as to the use and disposition of the natural gas by El Paso, is not in issue in this case, and would be a sale in interstate commerce for resale subject to Commission jurisdiction. The purchase and receipt of the gas by El Paso under each contract would involve separate facilities and separate metering, and the contract requires El Paso to make certain that its consumption of gas outside Texas would at all times exceed the volumes purchased under the first, restricted-use contract.

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[3] Only sales for resale are subject to Commission jurisdiction; Section 1(b) of the Natural Gas Act, *op. cit. supra*, note 1.

Houston did not file an application for a certificate of public convenience and necessity under the Natural Gas Act. It did file a "Petition for Declaratory Order to Remove Uncertainty", requesting a determination of status in advance of deliveries (R. 907-923). Lo-Vaca filed two certificate applications: one for "gathering and delivery" of the gas to be sold under its restricted-use contract, the other for "gathering and sale" under the contract not in issue in this case.[4] As to both sales, Lo-Vaca requested certificate authorization for transportation. The producers selling to Lo-Vaca must obtain certificate authorization from the Commission since their sales would be sales for resale.

El Paso and its subsidiary, Gas Supply, applied for certificates of a routine nature from the Commission, Gas Supply for authority to construct and operate the 227-mile, 30-inch pipe line to transport gas for El Paso, and El Paso for authority to make additional sales and for sundry facilities necessary to handle the additional supply of gas. The initial cost of the gas proposed to be purchased by El Paso is 22 cents an Mcf under both Lo-Vaca contracts, and approximately 19½ cents an Mcf under the Houston contract.

An examiner of the Commission held that the Houston sale was not subject to jurisdiction, but that the Lo-Vaca restricted-use sale was jurisdictional (R. 994-1019). The examiner held that the Houston proposal was non-jurisdictional because the gas would be produced wholly in Texas, transported only in Texas, not commingled with gas from outside the state, and separated from the commingled stream

[4] Section 1(b), *op. cit. supra*, note 1; R. 812-817.

before any part would leave the State (R. 1010). The Commission, on October 23, 1961, reversed as to the Houston sale, one Commissioner dissenting, holding that both sales were for resale and subject to jurisdiction (R. 1100-1113). The Court of Appeals for the Fifth Circuit reversed as to both sales, one judge dissenting, and this decision is now before this Court for review.

SUMMARY OF ARGUMENT

The decision of the court below is wholly consistent with and supported by judicial and Commission precedents specifically applicable to a delineation of the Commission's resale jurisdiction under the Natural Gas Act. It accords with the comprehensive plan for divided federal and state regulation contemplated by Congress in enacting the Natural Gas Act. The proposed Houston and Lo-Vaca transactions are neither in terms nor in fact sales for resale in interstate commerce subject to the jurisdiction of the Commission under the Natural Gas Act. In determining whether a sale is a direct sale or a sale for resale the focus of the Act is upon the sale itself, the provisions of the contract as contemplated by the parties, not upon the events consequent to physical commingling as urged under the sweeping theory advanced by the Petitioners. Nor do the decisions of this Court permit a flexible standard in determining jurisdiction; the contentions of Petitioners that the decision below will jeopardize effective regulation, if permissible at all, do not withstand analysis.

ARGUMENT

A. Introduction

In both the Lo-Vaca and the Houston sales the gas proposed to be sold will be commingled with other gas purchased by El Paso which is destined for resale in interstate commerce. The question therefore becomes: does the mere fact that the gas will be transported in a commingled stream, and that consequently the precise molecules of gas which will be consumed either within Texas or by El Paso in its compressor stations outside of Texas cannot be physically traced or separately indentified, convert the proposed non-jurisdictional sales into sales for resale, subject to the Commission's jurisdiction under Section 1(b) of the Natural Gas Act?

The Petitioners argue that the admitted showing that the *volumes* sold by Houston and Lo-Vaca would be consumed as proposed is not enough; and that, to be considered direct sales as specified by the contract, Houston and Lo-Vaca would have to establish that the gas sold for such purposes was physically supplied by them, and not by other suppliers. If this theory were to be accepted by this Court, the Commission would have resale jurisdiction in all instances in which the gas being sold could be transported physically into another state for resale.[5] This is a

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[5] The 1962 Annual Report to Congress of the Federal Power Commission states, at page 25, under the heading "New Regulatory Policies":

> "• • • the Commission held that its jurisdiction over the sale of natural gas to interstate pipeline companies included sales where the gas can move physically into another State for resale, regardless of any contractual provisions designed to limit its use • • • once the gas is received into a company's general system transportation facilities, it will be used for every system purpose because it would be physically impossible to restrict the consumption of the gas • • •."

broad and sweeping assertion of jurisdiction, an assertion with significance far beyond the confines of this case. It has no support in the decided cases, and it would breach that "bright line easily ascertained" between federal and state jurisdiction only recently restated by this Court in *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205 at 215 (1964).

B. Commingling in a Pipeline of Natural Gas, Part of Which Will Not Be Resold in Interstate Commerce and the Remainder of Which Will Be So Resold, Does Not in and of Itself Subject the Entire Stream of Gas to the Commission's Jurisdiction

Long before the Natural Gas Act was passed, this Court had occasion to concern itself with the intricacies of federal and state jurisdiction over a commingled stream of gas. In *Peoples Natural Gas Co.* v. *P.S.C. of Pennsylvania*, 270 U.S. 550 (1926), it was held that a state commission did not burden interstate commerce by ordering an interstate pipeline company to deliver, from a commingled interstate and intrastate stream of gas, a volume of gas equivalent to the amount of intrastate gas in the commingled stream. This Court there said:

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other. * * *". (*Id.* at 554-555)

Since passage of the Natural Gas Act, this Court, as respects commingling, has never departed from the

doctrine enunciated in the *Peoples* case. Thus, in *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945), the Court stated:

> "It is thus apparent that the pipeline from Texas to Colorado serves three different uses; (a) intrastate transportation and sale in Texas; (b) interstate transportation and sale to industrial customers; and (c) interstate transportation to distribution companies for resale. Only some of these activities are subject to the jurisdiction of the Commission * * *". (*Id.* at 585-586)

Similarly, in *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1960), a utility company in New York proposed to purchase gas directly for its own consumption from producers in Texas, transportation of such gas to be provided by enlargement of the existing facilities of the pipeline company. In affirming the Commission's denial of certificate authorization to the pipeline to construct the facilities needed to transport the gas, this Court held that the "direct" sale did "not entail a sale for resale in interstate commerce, [and] is not subject to the Commission's jurisdiction except insofar as § 7 requires the Commission to certificate the transportation of gas pursuant to the sale" (*id.* at 4), although the direct-sale gas would have been commingled with gas from many sources, and its molecules could not have been separately identified.

This Court's language in *U. S.* v. *P. U. C. of California*, 345 U.S. 295 (1953), is of particular importance because it has been cited and relied upon in several succeeding cases. An electric company sold to the Navy Department in California energy produced in California. The Department then transmitted the

energy over its own line into Nevada where it consumed most of the energy itself, but resold a minor part. One contract covered the entire sale in California. This Court reversed the decision of the California Supreme Court that the California Commission had jurisdiction over the entire sale. Contentions that Power Commission jurisdiction attached only to the portion of the energy resold were rejected because the record did not justify that result (*id.* at 317). Continuing, this Court stated (*id.* at 317-318):

> "* * * Assuming respondent's theory [proportional limitation] this would turn, of course, on whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable. * * * there is no record evidence of separate rates, separate negotiations, separate contracts or separate rate regulation by official bodies, in short that the 'sales' themselves were separate, and it is in those terms that the Act would require us to fix the limits of the jurisdictional grant. * * *" (footnote omitted)

Shortly thereafter this Court denied certiorari (345 U.S. 934) to a decision which affirmed a Power Commission determination that it had jurisdiction over the entire sale, *California Electric Power Co.* v. *F.P.C.*, 199 F. 2d 206 (9th Cir. 1953).

In the footnote omitted from the preceding quotation (345 U.S. at 318), this Court noted that "[t]he Commission's own view of the matter [proportional limitation of jurisdiction] may still be in the formative stage", citing *Colorado Interstate Gas Co.* v. *F.P.C.*, 185 F. 2d 357 (3rd Cir. 1950), and *Hastings* v. *Kansas-Nebraska Natural Gas Co.*, 12 FPC 3. In the *Colorado* case, the court had held that the scope of the Commission's resale jurisdiction over a commingled stream of

gas, some of which was resold and some was not, was not properly before it. The Commission later held, consistent with the *Hastings* case, discussed hereafter, that a sale of gas by Colorado Interstate under a separate contract pursuant to which the purchaser would itself consume the gas, even though commingled with gas sold for resale, was a direct sale not subject to Commission jurisdiction. *Colorado Interstate Gas Co.*, 19 FPC 1012.

The *Hastings* case was reviewed in *City of Hastings, Nebraska* v. *F.P.C.*, 221 F. 2d 31 (DC Cir. 1954). Gas under separate contracts, part of which was to be resold and part to be used by the purchaser in its power plant, was transported in the same pipeline. The lower court held, affirming the Commission, that the direct sale was not subject to the Commission's resale jurisdiction. This Court denied certiorari, 349 U.S. 920.[6]

In *North Dakota* v. *F.P.C.*, 247 F. 2d 173 (8th Cir. 1957), a pipeline purchased gas in North Dakota under four contracts involving two sellers, and transported the gas westerly through its pipeline which extended into the State of Montana. En route, part of the gas was delivered for resale in four communities in North Dakota, and the balance was transported across the state line into Montana for resale. The lower court upheld the Commission's determination that the sales for resale in the four communities were made in intrastate commerce, and consequently not subject to the Commission's juris-

[6] For related litigation, in which approval was expressed of the concept of identification by volumes, see *City of Hastings, Nebraska* v. *Kansas-Nebraska Natural Gas Co., Inc.*, 226 F. 2d 419, 422 (8th Cir. 1955).

diction. In short, the fact that all of the gas—both that destined for intrastate and that destined for interstate sales—was commingled did not change the character of the intrastate sales.

In *Amerada Petroleum Corporation* v. *F.P.C.*, 334 F. 2d 404 (8th Cir. 1964), the Commission was unanimously reversed in a factual situation substantially the same—both as to parties, circumstances, and locale—as in *North Dakota* v. *F.P.C.* There, as in *North Dakota*, the intrastate gas was identified by volume, by delivery and metering both on and off the pipeline, and by separate contracts. Notwithstanding the fact that the intrastate stream was commingled with gas destined to cross the state line for resale in interstate commerce, the intrastate resales were held not to be interstate commerce, and hence not subject to Commission jurisdiction.[7]

The *rationale* underlying these cases is not difficult to discern. Natural gas is a fungible commodity.[8] Since it is fully interchangeable, the commingling in a common stream of gas which is not subject to the Commission's resale jurisdiction with other gas which

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[7] In numerous gas cases, the Commission has either directly or by implication held that the fact of commingling was not a basis for a finding of jurisdiction: *Trans-Continental Gas Pipe Line Corp., Inc.*, 7 FPC 24 (1948); *Colorado Interstate Gas Co.*, 19 FPC 1012 (1958); *Hope Producing Co.*, Docket No. G-15537, order issued February 3, 1959; *Houston Texas Gas & Oil Corp.*, 16 FPC 118 (1956); *Shell Oil Co.*, 25 FPC 1316 (1961); *City of Colton* v. *Southern California Edison Co.*, 26 FPC 223, 234 5, 237 (1961). *Contra: Oklahoma Natural Gas Co.*, 23 FPC 291 (1960).

[8] For an article dealing with this general subject, see Arnold, 23 Col. L. Rev. 235 (1923). The laws governing fungibles may be traced to the time of Justinian; see *Institutes of Justinian*, Liber II, Title I, Section 28.

is so subject does not, in and of itself, change the legal status of the "non-jurisdictional" gas: compare *U. S.* v. *Luther,* 225 F. 2d 499, 504 (10th Cir. 1955), *certiorari* denied, 350 U.S. 947 (1955); *Central States Corp.* v. *Luther,* 215 F. 2d 38, 45 (10th Cir., 1954), *certiorari* denied, 348 U.S. 951 (1954); *Standard Bank* v. *Lowman,* 1 F. 2d 935, 940 (W.D. Wash. 1924); and *In Re Wyoming Valley Collieries Co.,* 29 F. Supp. 106 (M.D. Penn. 1939).

As these cases demonstrate, the tracing is of volumes, not of the individual units making up such volumes. Thus, in *Eureka Pipeline Co.* v. *Hallanan,* 257 U.S. 265 (1921), an oil pipeline case, it was conceded that a state had the power to tax the part of the commingled oil stream that was produced and consumed within the state. To like effect is *Federal Tender Board No. 1* v. *Haynes Oil Corp.,* 80 F. 2d 468 (5th Cir. 1935), in which the court upheld proportionate separation of commingled volumes of oil against the government's contention that commingling of lawfully produced oil with "contraband oil" had destroyed the separate character of the lawful oil. In permitting separation by volume, the court stated:

> "* * * Commingling and proportionate separation is daily practiced in the business of grain elevators, pipelines and the like. We see no reason why the practice is not proper here. * * *" (*Id.* at p. 469)[9]

The cited cases demonstrate that the mere fact that the Houston and Lo-Vaca gas will be physically com-

[9] To like effect is *Humble Oil and Refining Co.* v. *Texas and Pacific Railway Co.,* Tex. 289 S.W. 2d. 547 (1955). *Cf. Chicago, Milwaukee & St. Paul Railway Co.* v. *P.U.C. of Illinois,* 242 U.S. 341 (1917).

mingled with other gas destined for resale does not, in and of itself, convert the proposed sales to jurisdictional resales. Likewise physical commingling does not convert Houston's transportation to the point of sale into transportation in interstate commerce. Houston's proposed sale for consumption in the state of origin is not a sale in interstate commerce. Nor is it a sale in interstate commerce for resale. Lo-Vaca's proposed sale, while in interstate commerce, is not a sale for resale since it is sold for consumption by the purchaser.

Petitioners nevertheless urge that this Court's prior decisions in this and related fields require that the court below be reversed. We now propose to show that Petitioners have misconstrued the cases and that the decision of the court below is consistent with the regulatory scheme of the Natural Gas Act.

C. The Commission's Jurisdiction Over Sales Is Limited to Sales in Interstate Commerce for Resale, and Neither the Lo-Vaca Nor the Houston Sale Fits That Category

In *Panhandle Eastern Pipe Line Co.* v. *P.U.C. of Indiana,* 332 U.S. 507, this Court stated (*id.* at 516-517):

> "* * * Three things and three things only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.
>
> * * * * *
>
> The line of the statute was thus clear and complete. It cut sharply and cleanly between sales

> for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise and the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed." (footnote omitted)

This construction of the Act was recently reaffirmed in *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205, 214-215. The decided cases show that the "realities of gas flow,"[10] on which Petitioners rely, have no bearing on the issue of the Commission's resale jurisdiction. The focus of the Act is on *sales*, and the *contracts* under which such sales are made, not only for the purpose of determining whether such sales are jurisdictional, but also for the purpose of determining the propriety and legality of the rates and charges applicable to a sale once it has been concluded that the sale is jurisdictional: *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

The Commission relies on a series of electric and gas cases[11] which it says demonstrate that this Court has "relied upon the physical facts in determining whether sales are in interstate commerce." And indeed the Court has; but such cases bear on the issue of whether there is interstate commerce—not the question which the Petitioners pose and not on the

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[10] FPC Br. 11; Cal. Br. 20, "physical flow"; Cal. Cos. Br. 5 "physically transported." Also, the Petitioners state the "question presented" by assuming that the question is answerable in physical terms.

[11] *Jersey Central Power & Light Co.* v. *F.P.C.*, 319 U.S. 61; *Interstate Natural Gas Co.* v. *F.P.C.*, 331 U.S. 682, 687; *F.P.C.* v. *East Ohio Gas Co.*, 338 U.S. 464, 467; *Connecticut Light & Power Co.* v. *F.P.C.*, 324 U.S. 515, 529; *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205, 209 n. 5.

issue of whether certain sales are direct or wholesales. Thus, the *Jersey Central* and *East Ohio* cases turned upon the jurisdictional issue of whether the facilities involved were in interstate commerce, not on whether any sales involved were resales in interstate commerce. Furthermore, the Commission's reliance, at page 13 of its brief, on a quotation from *Connecticut* is out of context. It is not qualified, as it must be. The statement in that case that "the test under Part II of the Power Act is 'engineering and scientific, rather than * * * legalistic or governmental,'" as this Court's opinion shows, was part of a draft proposal applicable to the proposed Commission's jurisdiction which was *not* fully accepted by Congress. Instead, an exemption "over facilities used in local distribution" was adopted by Congress. It is true that this Court referred to the technological transmission test in the recent *California Edison* case (276 U.S. 205, 209 n. 5) as stated by the Commission (FPC Br. 13). But in that case this Court likewise referred to the definition of facilities used in local distribution as

> "* * * a limitation on FPC jurisdiction and a legal standard to be given effect in addition to the technological transmission test * * *" (*id.* at 210 n. 6),

citing *Connecticut*. The test adopted was consequently both "legalistic" and "governmental." It should be noted that this case was concerned with the question of jurisdiction over facilities—not inquiry into the nature of sales—a necessary predicate to the regulation of the company's accounting practices over which the Commission had asserted jurisdiction.

The *Interstate Natural* case dealt in part with the issue of whether sales were in interstate commerce; but the Commission's long quotation (FPC Br. 13-14) merely recites the fact of interstate movement, which is beside the point here. The Commission's reliance on that case, as well as on *Deep South Oil Co.* v. *F.P.C.*, 247 F. 2d 882 (5th Cir. 1957), *certiorari* denied, 355 U.S. 930 (1958), and *Shell Oil Co.* v. *F.P.C.*, 247 F. 2d 900 (5th Cir. 1957) (FPC Br. 15, 18-19; Cal. Br. 36; Cal. Cos. Br. 8), is misplaced. These cases did not reach the issue presented here. In each case the company claimed that their sale was within the "production or gathering" exemption of Section 1(b) of the Act, and this was the principal issue involved. In all of these cases the contracts involved contemplated that a part or all of the gas would be resold in interstate commerce. As the court in *Deep South* noted: "All of the parties to the contract * * * fully understood that the gas was to be resold in wholesale quantities by the buyer." (247 F. 2d at 888)

As a second line of attack, Petitioners seek to distinguish certain cases relied upon by the court below, which held, as part of the consistent line of authorities cited in the first part of this argument, that sales are identifiable by volume and remain non-jurisdictional although commingled with jurisdictional volumes. Essentially the Commission (FPC Br. 27-34) and the State of California (Cal. Br. 22-29) assert that the *P.U.C. of California* case (345 U.S. 295), the *City of Hastings* case (221 F. 2d 31, *certiorari* denied, 349 U.S. 920), and the *North Dakota* case (247 F. 2d 173) involve a single source of supply, and that the lack of this element somehow distinguishes the sales at issue in this case. In *P.U.C.* there was one supplier

and one contract, with the observation that the result might have been different had there been a second contract covering the energy to be consumed by the buyer. In *Hastings* there was one supplier and two separate contracts. In *North Dakota* there were two suppliers and four separate contracts. *In this case there are two suppliers and three separate contracts.* We submit that the reason *P.U.C.* was decided in favor of jurisdiction, and *Hastings* and *North Dakota* were decided against jurisdiction, is that the contract itself in *P.U.C.* contemplated a resale of a portion of the energy in interstate commerce, while in *Hastings* and *North Dakota* the non-jurisdictional contracts contemplated that *none* of the gas so sold would be resold in interstate commerce.

The Commission also contends that in "other, but related, contexts, this Court has also disregarded provisons of contracts which place a fictitious construction upon business transactions solely for the purpose of achieving a particular jurisdictional result" (FPC Br. 15).[12] But neither the cases nor the very general proposition is relevant to this case. There is no "fiction" in the Houston or Lo-Vaca contracts; they both recognize the element of commingling (R. 421, R. 842), and there is no question that El Paso would do its part by consuming quantities of gas equal to or in excess of the contract volumes. None of the cases cited by the Commisison in this connection was con-

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[12] Citing *Sprout* v. *South Bend*, 277 U.S. 163, 168; *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390; *B&O S.W. R.R. Co.* v. *Settle*, 260 U.S. 166, 170, also cited in the California brief, p. 36; *U. S.* v. *San Francisco*, 310 U.S. 16, 28; *Higgins* v. *Smith*, 308 U.S. 473, 477-478; *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 526-527. Compare *Atlantic Coast Line R.R.* v. *Standard Oil Co.*, 275 U.S. 257.

cerned with fungibility.[13] Had there been there is every reason to believe that separate treatment would have been accorded volumes identifiable by contract. Compare *Humble Oil & Refining Co.* v. *Texas & Pacific Railway Co., supra,* p. 14.

In its "Introduction and Summary" (FPC Br. 10) the Commission states:

> "It is settled that where part of a stream of natural gas or electric energy sold under a single contract is interstate in character and is resold by the purchaser, the entire transaction falls within the Commission's jurisdiction, even though the remainder is consumed by the purchaser itself or within the producing State * * *",

citing *Pennsylvania Water & Power Co.* v. *F.P.C.*, 343 U.S. 414, *U. S.* v. *P.U.C. of California, supra,* p. 10, and *F.P.C.* v. *Southern California Edison Co., supra,* p. 9. Plainly this statement is not relevant here where *separate* contracts are involved.[14] But an analysis of the cases is illuminating. Each involved a single sale, under a single contract, in which part of the energy would be resold in interstate commerce. This fact, not the quantum of energy to be resold in interstate commerce, determined the Commission's jurisdiction. In short, the cases were decided upon

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[13] Indeed, in the *Atlantic Coast Line* case (275 U.S. at 270-271), the oil involved was recognized by this Court as a fungible, but it was not "labeled or identified in any particular way." This Court recognized, however, identification of a fungible, saying: "It is not a question of maintaining the identity of oil as if a fungible in storage tanks through which it passed."

[14] In addition, for a description of the great difference in the physical operations involved in the *Pennsylvania* case, see *Pennsylvania Water & Power Co.* v. *F.P.C.*, 193 F. 2d 230 at 233.

the basis of the nature of the *sale*, not on the "realities" in terms of the disposition of the energy.

D. Asserted Consequences of the Decision Below

We agree with the Commission that "the force of this Court's decisions remains unimpaired and that the principles on which the decisions rest should be applied consistently." (FPC Br. 34) We have shown that the transactions here proposed *are* consistent with this Court's prior holdings elucidating the scheme of regulation envisaged by the Natural Gas Act. In fact, the jurisdictional issues here presented do not lend themselves to a "flexible" approach to the permissible reach of federal jurisdiction over interstate transactions. As this Court stated in *F.P.C.* v. *Southern California Edison Co.*, 376 U.S. 205, 214-216:

> "* * * the court held[15] that Congress, rather than adopting this flexible approach, * * * 'undertook to regulate . . . without the necessity, where Congress has not acted, of drawing the precise line between state and federal power by the litigation of particular cases.' * * *
>
> "This conclusion has been consistently reaffirmed in subsequent cases. In Panhandle Eastern Pipe Line Co. v. Public Service Comm'n, 332 U.S. 507, which considered the reach of § 1(b) of the Natural Gas Act, the Court said that 'the line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities, or otherwise' * * *

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[15] Referring to *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498.

> "* * * In short, our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States. * * *"

The Commission complains that "major opportunities for discrimination" and the creation of a "class of independent producer sales which are free from effective regulation, state or federal" would result from a holding in this Court that the transactions here involved are not subject to its resale jurisdiction (FPC Br. 22). And it contends that a "gap" in the comprehensive scheme of regulations established by Congress would thereby result (FPC Br. 24-25).

We submit that under this Court's prior rulings no gap would be created in the Congressional scheme of regulation if this Court decides that the contracts in question are not subject to the Commission's resale jurisdiction. In the first place, unlike the gap to which this Court referred in the *Transcontinental* case (*F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 at 28), there is no inhibition here on the power of the states to exercise jurisdiction over the sales in

issue;[16] indeed, in the case at hand, this authority has been implemented by statute.[17]

Apart from this, the test established by Congress and consistently followed by this Court does not depend on the degree of jurisdiction actually being exercised by the states; rather, it is coterminous with the scope of permissible state jurisdiction as it was thought to exist at the time of *Attleboro*.[18] Thus it is very questionable whether arguments questioning the effectiveness of state regulation are appropriate (FPC Br. 24).

Responding, nevertheless, to these arguments, the alleged dire consequences of sustaining the lower court (FPC Br. 23-27) do not realistically portray the extent of the Commission's jurisdiction under the Natural Gas Act. Before El Paso can either purchase or transport the gas here in issue, it must obtain a certificate of public convenience and necessity, subject to the evidentiary burden of proof imposed on it by the

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[16] *U.S.* v. *P.U.C. of Califorina, supra*, p. 10. It is clear that California could have continued to exercise jurisdiction if none of the energy had been resold.

[17] As to gas pipelines see Vernon's Texas Annotated Statutes 6056-6066. The purpose of this regulatory act is the protection of the consumer: *State* v. *Public Service Corp. of Texas*, 88 S.W. 2d 627 (Tex. Civ. App. 1936). With respect to Lo-Vaca, the Commission has recently held that its existing operations were subject to the jurisdiction of the Texas Railroad Commission, and that such regulatory jurisdiction was being exercised: *United Gas Pipe Line Co.* v. *Coastal States Gas Producing Co.*, Docket No. CP64-75, Opinion No. 419 issued February 10, 1964, mimeo. ed. p. 4.

[18] *P.U.C.* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83; *F.P.C.* v. ***Southern California Edison Co., supra***, p. 9, and the cases cited therein.

provisions of Section 7 of the Natural Gas Act. Section 7 (c)[19] provides that

> "* * * a certificate shall be issued * * * *if* it is found * * * that the proposed service, rate, operation, construction, extension or acquisition, to the extent authorized by the certificate, *is or will be required* by the present or future public convenience and necessity; *otherwise such application shall be denied.* * * *" (Emphasis supplied)

Section 19 (b)[20] of the Act pertaining to the court review of Commission orders provides:

> "* * * The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *"

The *Transcontinental* case (365 U.S. 1),—on which the Commission relies to support its "gap" theory—demonstrates that the Commission's obligation to protect the interests of ultimate consumers can be effectively exercised in this and in similar cases arising in the future under the provisions of Section 7 of the Act. As the Commission itself points out (F.P.C. Br. 22):

> "* * * However, under its plenary power over 'the transportation of Natural gas in interstate commerce' (§§ 1 (b) and 7 (c) of the Act, 15 U.S.C. 717 b), 717f (c)—the power successfully asserted in Transcontinental—the Commission would retain authority to certificate the pipeline's transportation service on such conditions as might

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[19] 15 U.S.C. 717 f(c).

[20] 15 U.S.C. 717 r(b).

be required by the public convenience and necessity.'"[21]

What was true of Transcontinental's proposed transportation service would be equally true of El Paso's proposed transportation, resale, and usage in its compressor stations of the gas it proposes to purchase here. In that case—in which, as here, both jurisdictional gas and non-jurisdictional gas were proposed to be commingled—it was held that the Commission had plenary authority to weigh the various considerations bearing on the public convenience and necessity and, in fact, to refuse to certificate the project at all. The same authority is available to it here.[22]

With reference to control over construction of new facilities, a cardinal difference between the Natural Gas Act and the Federal Power Act (16 U.S.C. 791a-825r) should be considered. The Commission has no certificate authority under the Power Act, only authority over certain interconnections (16 U.S.C. 824a). This distinction is significant because most of the cases relied upon by the Commission arose under the Power Act. The two Acts are entirely different in terms of the scope of federal regulation.

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[21] See this Court's decision in *Atlantic Refining Co.* v. *F.P.C.*, 360 U.S. 378 (1959), in which it was pointed out that Sections 7 (e) and 4 (c) were the "heart of the Act." (*id.* at 388)

[22] It is in light of this that the Commission's quotation from the *Transcontinental case* (F.P.C. Br. 24-25) is to be understood; the question presented there was the scope of Commission authority under Section 7 of this Act—*not Section 1(b)*—, and the Court's references to a "gap" and its statement "that Congress desired regulation by federal authorities rather than nonregulation" were made in that context.

Furthermore, the examples of alleged discrimination listed by the Commission at pages 23-24 of its Brief simply do not mirror the actuality of the Commission's regulatory authority under the Natural Gas Act. A pipeline proposing to obtain a certificate is *not* free to designate the "particular source * * * from which the gas should be deemed to come"—we would say, rather, free to designate the particular use to which gas from a specific source will be put—unless the Commission first concludes that the proposal is in the public interest, and that its application for a certificate should either be granted unconditionally, or on such modified basis as the public interest may require. Nor is a pipeline free under established Commission rate procedures, to allocate to non-jurisdictional customers its purported lower gas-purchase costs from non-jurisdictional sources.[23]

The proposed Houston sale demonstrates some of the advantages of limited federal jurisdiction over sales. Most of Houston's contracts with its producers would terminate if it sold gas in interstate commerce. Hence a finding that its proposed sale to El Paso was for resale in interstate commerce would of necessity make it impossible for Houston to carry through its proposal, in spite of the fact that the sale has substantial ad-

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[23] See Commission Opinion No. 428, *United Gas Pipe Line Co.*, Docket No. RP63-1, issued May 14, 1964, mimeo. ed. p. 17. Under these procedures *all* gas purchase costs are "rolled-in" before determining, on an Mcf basis, the gas-purchase cost to be attributed to jurisdictional customers. Thus discrimination in favor of a non-jurisdictional customers would be avoided by allocating average gas costs to jurisdictional customers, so that the pipeline would not recover its gas costs if the rate to the non-jurisdictional customer was based upon the low-cost gas supply.

vantages for El Paso and its customers.[24] The common and highly beneficial meshing of interstate with intrastate sales and operations, heretofore considered separable, may well become impossible in the future if it is concluded by this Court that transactions such as the one in question are subject to the Commission's resale jurisdiction. As a further example, an application now pending before the Commission contemplates joint use by an interstate and an intrastate pipeline of a storage field owned by the intrastate company. The latter will not effectuate the proposal if the Commission concludes that the company will thereby become subject to Commission jurisdiction under the Natural Gas Act;[25] and a decision by this Court sustaining Commission jurisdiction on the theory advanced by the Commission would, in our opinion, have just that effect.

Such an extension of federal regulatory authority is neither necessary nor within the scope of the jurisdictional powers granted the Commission under the Natural Gas Act. Rather than provide additional protection to ultimate consumers, we believe that it would operate to their detriment.

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[24] Houston's contract price is approximately 19½ cents an Mcf, which includes all of Houston's gathering and transportation. The Commission's wellhead ceiling price for resales of gas in Live Oak County is 16 cents an Mcf (Eighth Amendment, issued December 9, 1963, to the Commission's Statement of General Policy No. 61-1). Houston's average system cost is approximately 13½ cents an Mcf (R. 439).

[25] See order for hearing issued September 16, 1964, in FPC Docket Nos. CP64-150, *et al.*, *Natural Gas Pipeline Co., et al.*

CONCLUSION

For the foregoing reasons, the opinion of the court under review should be affirmed.

Respectfully submitted,

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October 19, 1964